

No. 11564

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

DAVID E. MEINTSMA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE UNITED
STATES OF AMERICA.

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Statement of the Case.

Appellant makes no reference to the pleadings raising the issues upon which the case went to trial. It will simplify the labor of this Honorable Court to have certain propositions pointed out clearly at the outset. The libel contains one cause of action. That cause of action is for damages for personal injuries. There is no cause of action for the recovery of maintenance. There is no cause of action for the recovery of wages. As a matter of fact there are no allegations in the libel with reference to any claim for maintenance or wages.

In appellant's Statement of the Case, he says that he was required to walk "on the *slippery* steel noses of the steps instead of on the flat treads." (Op. Br. p. 3, lines 16-17.) There is no evidence that the steel noses of the

steps were slippery or that the steel nose of any step was slippery.

Appellant also omits to include in his Statement of the Case certain testimony given by him which appellee believes is important. It is as follows:

Whatever movement was occurring in the way of the ship getting away from the dock and moving back toward the dock was a slow movement and didn't occur very often. [Ap. 24.]

When I got to the bottom step (of the gangway) I hesitated for a few seconds or a minute before I made up my mind to jump. I was thinking over in my own mind whether I could or could not make it. After looking the whole situation over and considering my own physical ability and condition I came to the conclusion that I could jump and make this space and land safely. After I went through those mental calculations and thoughts I jumped. [Ap. 34-35.]

The gangway was one that stayed close to the side of the ship all the way down to the bottom. At the end of the gangway there were two ropes, one on each side, which went from the extreme lower end of the gangway up onto some part of the ship. There was one rope on the outside and one on the inside of the lower end of the gangway. There was no reason why I could not hold onto that rope or one of them when I got to the bottom of the gangway. I may have grabbed hold of one of those ropes to help me swing ashore.

After I got down there to the bottom of the gangway and surveyed the situation I did not think about going back aboard ship at all for any purpose. All of the officers were aboard ship that day before I left.

I don't know who would be responsible for rigging the gangway. From my experience aboard ship I knew that any one of the mates would have authority to do something about it if he was asked. I knew that at least some of the deck officers were aboard the ship. The reason I didn't go back upstairs and ask one of them to have the end of the gangway lowered down so that it would come nearer to the dock before I tried to get off was I just didn't think of it. That occurred to me as rather a sensible thing to do under the circumstances but I wasn't actually aware of the circumstances until I reached the end of the gangway. I have told you that when I got to the top of the gangway, before I started down, I could see it wasn't touching the dock; I knew that.

I knew at the time I started down the gangway that the lower end of the gangway wasn't resting on the dock. I could see there was a space between the lower end of the gangway and the nearest surface of the dock before I started down. My judgment of distance was good enough to let me know that it was at least two or three feet between the lower end of the gangway and the dock before I started down. From the top of the gangway to the bottom of the gangway was about 15 feet. It was broad daylight.

If there hadn't been any gangway there at all I wouldn't have jumped from the deck of the vessel out to the dock.
[Ap. 36-39.]

The reason I didn't go and ask somebody to lower the gangway so that it would come in contact with the dock or be close enough so that there wouldn't be any step to speak of was that I was just under the impression that I would be able to make it. That is all I can say. In other

words, my explanation is this: When I was up there at the top of the gangway and could see the situation fairly accurately I came to the conclusion that I could make it and there was no necessity to ask anybody to lower it. [Ap. 40.]

When I went down the gangway the last time it had been re-rigged so that the lowest end was closer to the dock. I believe it was setting on the dock. I didn't have to jump at all. I had no trouble getting off the gangway the last time. [Ap. 45.] I wouldn't have had any trouble just jumping from the lower end of the gangway onto the dock if the lower end of the gangway had been directly above the surface of the dock. The thing that really caused the trouble was not the distance between the lower end of the gangway and the surface of the dock but the fact that the ship had moved two or three feet away from the dock; being away from the dock was really the source of the trouble. [Ap. 46.]

Statement as to Jurisdiction.

In view of the contentions asserted by the appellant (for the first time on appeal) that he is entitled to maintenance and wages, appellee disputes appellant's contention that this Honorable Court has jurisdiction over those subject matters. Appellant's right to sue the United States of America is found in Title 50 App. U. S. C. A., Sec. 1291. In substance, as applied to the facts of this case, the section provides that the members of a crew on a United States vessel as employees of the United States through the War Shipping Administration shall, with respect to injuries, maintenance and cure, and the collection of wages, have all of the rights under law applicable to citizens of the United States employed as seamen on

privately owned and operated American vessels, but that before any suit shall be commenced a claim must be presented for administrative consideration. The Court has no jurisdiction to consider any claim for maintenance or wages in the case at bar for the reason that there is no showing that any such claims were ever submitted for administrative handling.

This Honorable Court will notice that the libel is silent with reference to maintenance and wages.

Appellee's Argument.

In order to recover or make out a *prima facie* case the appellant would be required to prove that there was some defect or insufficiency in connection with the gangway and that such defect or insufficiency was due to negligence on the part of appellee or that some fellow crew member was negligent and that such negligence wholly or in part caused appellant some injury.

The appellant has offered no evidence showing that the gangway was in a defective condition or that it was insufficient for the purpose for which it was furnished. Appellant has offered no evidence showing that any fellow crew member was guilty of any negligence in the premises.

Appellant's testimony shows that the gangway could have been lowered so that the lower portion with the wheels would have rested on the surface of the dock. Appellant would have the Court treat him as though he were *no sui juris*. If there had been no gangway at all and the appellant had a desire to get from the vessel to the dock the Court would certainly make it his obligation to request that the vessel furnish some means of getting from

the vessel to the dock and wouldn't permit appellant to recover in the event he chose to jump.

Appellee contends that the seaman himself is under an obligation to ask for those things which he may need in the event they are not present at the exact time when he desires to use them. If the appellant in the case at bar had requested that the gangway be lowered so that it would be in contact with the surface of the dock before he started down there is no reason to assume that his request would not have been complied with.

The testimony of the appellant shows that he voluntarily came to the conclusion, after surveying the situation, that he could accomplish the jump. Having made up his own mind and not being under any orders to leave the vessel at the particular moment, it seems to appellee that there is no ground upon which appellant can now claim damages for the injuries sustained.

Respectfully submitted,

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